



# **POLITICS AND LAW**

## **Stage 3**

### **WACE Examination 2010**

#### **Sample Marking Key**

Section one: Short answers

(30 marks)

Question 1

(a) In Australian politics what is meant by the term 'Cabinet'?

Description	Marks
<ul style="list-style-type: none"> <li>Clear explanation of the term with reference to 'engine room'/source of power/major policy institution, and in Australia its membership is limited to senior ministers.</li> </ul>	2
<ul style="list-style-type: none"> <li>Mention of 'engine room'/source of authority or senior ministers only.</li> </ul>	1

(b) Outline three roles of the Prime Minister in the Australian political and legal system.

Description	Marks
<ul style="list-style-type: none"> <li>Three distinct roles of Prime Minister clearly specified in paragraph form including parliamentary/party leader, chair of cabinet, select ministry, advice to Governor General to call elections, represent the government to the media.</li> </ul>	3
<ul style="list-style-type: none"> <li>Two distinct roles are specified.</li> </ul>	2
<ul style="list-style-type: none"> <li>One distinct role or merely general description of the PM presented.</li> </ul>	1

(c) Assess the exercise of a main source of power as well as a key limitation of power faced by an Australian Prime Minister.

Description	Marks
<ul style="list-style-type: none"> <li>Identifies that the post of Prime Minister (and Cabinet) is not mentioned in the Australian Constitution; constitutional conventions and practices have evolved to provide the office of Prime Minister with several power bases.</li> <li>Provides one source of power including the ability to select the Cabinet and Ministry, to assign portfolios, to set the election date, to preside over Cabinet, to appoint Ambassadors, media focus. An assessment of the exercise of the source of power needs to be included</li> <li>Provides one limitation of power including the Senate, the media, likely challengers, the party machine. In the assessment of the limitation an example must be used.</li> </ul>	5
<ul style="list-style-type: none"> <li>Indicates a major source of power and a key limitation for a Prime Minister with little assessment and with a possible example.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Indicates either a major source of power and/or a key restraint of power for the Prime Minister without the use of an example.</li> </ul>	1-2

Question 2

(a) Explain the meaning of 'co-operative federalism'.

Description	Marks
<ul style="list-style-type: none"> <li>Recognition that formal division of powers between levels of government is retained but in practice much intergovernmental action is joint, with possible example.</li> </ul>	2
<ul style="list-style-type: none"> <li>Recognition of joint governmental action despite formal division of powers.</li> </ul>	1

(b) Briefly explain the principles of horizontal fiscal equalization as applied by the Commonwealth Grants Commission.

Description	Marks
<ul style="list-style-type: none"> <li>Explains that the Grants Commission is an advisory statutory authority.</li> <li>Explains the Grants Commission oversees the distribution of the GST (and some other monies) according to a determined formula.</li> <li>Explains the rationale for horizontal fiscal equalization is to achieve a similar standard of living in the States for comparable levels of taxation.</li> </ul>	3
<ul style="list-style-type: none"> <li>Explains that the Grants Commission distributes the GST (and some other monies).</li> <li>Explains that horizontal fiscal equalization is to achieve similar standards of living in the States.</li> </ul>	2
<ul style="list-style-type: none"> <li>Explains that the Grants Commission distributes the GST.</li> </ul>	1

(c) 'The Council of Australian Governments (COAG) has its advocates and critics.' Outline the membership of COAG. Assess one reason why COAG has advocates and one reason why it has critics.

Description	Marks
<ul style="list-style-type: none"> <li>Indicates the full membership of COAG including the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Governments.</li> <li>Presents and explains a reason why COAG has its advocates and provides case examples such as to avoid the 'blame game' and overcome deficiencies in the delivery of services e.g. development of national education policy.</li> <li>Presents and explains a reason why COAG has its critics and provides case examples such as the idea of 'financial coercion' using financial incentives to drive outcomes such as those in education.</li> </ul>	5
<ul style="list-style-type: none"> <li>Indicates most of the membership of COAG.</li> <li>Suggests one reason why COAG has its advocates without explanation.</li> <li>Suggests one reason why COAG has its critics without explanation.</li> <li>May provide a case example.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>May list some members of COAG.</li> <li>Makes a statement in support of, or critical of, COAG.</li> </ul>	1-2

Question 3

(a) Define 'accountability' in the Australian political and legal system.

Description	Marks
<ul style="list-style-type: none"> <li>Defines accountability in governance terms, of answerable or responsible for legislation/action, or incompetence, in a democratic polity which encompasses the right to question. Perhaps an example.</li> </ul>	2
<ul style="list-style-type: none"> <li>Makes some reference to notions of answerability or responsibility for action in a democratic polity which permits the right to question.</li> </ul>	1

(b) Outline three reasons why parliament is often unable to check the power of the executive.

Description	Marks
<ul style="list-style-type: none"> <li>Indicates three reasons why parliament may be unable to check executive power (such as strict party dominance, increased parliamentary time devoted to government business, tendency of Opposition to be obsessed with 'the story of the day', failure to approach question time on accountability grounds, lack of media interest in opposition accountability concerns).</li> </ul>	3
<ul style="list-style-type: none"> <li>Indicates two reasons why parliament may be unable to check executive power.</li> </ul>	2
<ul style="list-style-type: none"> <li>Indicates one reason why parliament may be able to check executive power.</li> </ul>	1

(c) Briefly describe and evaluate a key role of a tribunal which has an accountability role.

Description	Marks
<ul style="list-style-type: none"> <li>Identifies a tribunal such as the Administrative Appeals Tribunal.</li> <li>Specifies and explains an accountability role of the tribunal such as introduction of AAT in 1975 one of the key components of Australia's public law reform designed to protect the rights of individual citizens affected by administrative decisions, ensure openness and accountability on the part of government, and improve the standard of government decision making. Reviews the actions of a government body.</li> <li>Provides an example of its accountability role and evaluates this role (Kirby "if it were left to the courts to enforce the law in the nooks and crannies of public administration, many with complaints would be bound to be disappointed") – provides a check on public bodies.</li> <li>Provides a criticism of the tribunal as part of the evaluation such as the AAT can be seen to intrude in matters of policy and promote the individual over the good of the greater community.</li> </ul>	5
<ul style="list-style-type: none"> <li>Identifies a tribunal.</li> <li>Specifies a main role of accountability.</li> <li>Provides an example of its accountability role with minimal evaluation.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Identifies a tribunal.</li> <li>Provides a broad notion of a role of the tribunal, not necessarily linked to accountability.</li> </ul>	1-2

Question 4

(a) What is a constitutional right?

Description	Marks
<ul style="list-style-type: none"> <li>Explains term clearly with recognition that rights may be found directly in the Constitution – expressly stated such as S41, S51(xxxi), S80, S92, S116, S117 or that rights can be found by the High Court to be implied in the Constitution such as implied freedom of speech – <i>Lange v ABC</i>.</li> </ul>	2
<ul style="list-style-type: none"> <li>Has a general idea that it is a right stemming from the Constitution.</li> </ul>	1

(b) Distinguish between a common law right and a statutory right.

Description	Marks
<ul style="list-style-type: none"> <li>Clearly defines both rights and acknowledges the difference that a common law right is derived from the common law, developed from judicial precedence, interpretation, expansion and modification e.g. right to be presumed innocent until proven guilty and a statutory right is found expressly in legislation such as the <i>Racial Discrimination Act 1975</i>.</li> </ul>	3
<ul style="list-style-type: none"> <li>Defines both rights.</li> </ul>	2
<ul style="list-style-type: none"> <li>Defines one right only.</li> </ul>	1

(c) Identify and evaluate Australia's record on a particular right compared with another country.

Description	Marks
<ul style="list-style-type: none"> <li>Explains a sound case for what a right is, identifies a right recognisable in Australia, how they are enforceable and comparative explanation re another jurisdiction such as the right to vote – S 41 provision in the constitution, expanding the franchise, the right of prisoners (<i>Roach 2006</i>) compared to Canada where no formal right to vote existed until the adoption of the Charter. Section 3 guarantees all Canadian citizens the democratic right to vote in general federal or provincial elections and goes further than Australia with a right to be eligible for membership in the House of Commons or of a provincial legislative assembly. In 2004 it was found that prisoners could vote – compare to High Court Australia 2006 case.</li> <li>Concludes with statement about where the right is protected more extensively.</li> </ul>	5
<ul style="list-style-type: none"> <li>Explains what a right is and identifies one right recognisable in Australia, how it is enforceable and comparative explanation re another jurisdiction.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Makes a general statement about rights in Australia.</li> </ul>	1-2

Section Two: Source analysis

(40 marks)

Source One: Unit 3A. Constitutional Referendums 1901 to 2009

Question 5

- (a) What is meant by a casual vacancy of the Senate, the subject of a referendum in 1977, and how is it filled?

Description	Marks
<ul style="list-style-type: none"> <li>A vacancy in the Senate caused by the resignation or death of a sitting member between general elections.</li> <li>The vacancy is formally filled by the State Parliament where the vacancy has arisen. The replacement Senator must come from the same party (as a result of the 1977 referendum).</li> </ul>	2
<ul style="list-style-type: none"> <li>Recognition that a vacancy in the Senate is caused due to death or resignation or it is filled by the State Parliament with the new Senator required to come from the same party.</li> </ul>	1

- (b) Explain two reasons, using evidence from Source 1, as to why it can be difficult to achieve constitutional change through referenda.

Description	Marks
<ul style="list-style-type: none"> <li>Identifies that only 8 out of 44 referendum questions have been successful.</li> <li>Identifies that a major difficulty for a referendum to pass is due to the requirement of a double majority (that is a majority of states and an absolute majority of the electorate).</li> <li>Evidence is provided from the table of the requirement of a double majority e.g. 1906 6 states, 82.65% - passed/1999 0 states, 45.13% - didn't pass. Could again refer to the fact that 36 haven't passed.</li> <li>Identifies another difficulty with referendum such as if there is more than one question voters are likely to vote no e.g. 1999 republic referendum or the reluctance to give more power to the Commonwealth.</li> </ul>	4
<ul style="list-style-type: none"> <li>Identifies that only 8 out of 44 referendum questions have been successful.</li> <li>Identifies that a major difficulty for a referendum to pass is due to the requirement of a double majority (that is a majority of states and an absolute majority of the electorate).</li> <li>Identifies another reason such as the reluctance to give more power to the Commonwealth or if there is more than one question.</li> </ul>	3
<ul style="list-style-type: none"> <li>Identifies that few referendum questions have been successful without being specific.</li> <li>Identifies that a double majority is required to approve the proposal but offers no explanation or evidence.</li> </ul>	2
<ul style="list-style-type: none"> <li>May identify the limited success of referendum questions or may make reference to the difficulty of achieving a double majority.</li> </ul>	1

- (c) Analyse two reasons for the fact that only two referendums for changes to Section 51 of the Commonwealth Constitution (Australia) have been approved (S51 xxiiia-social services and S51xxvi-Aboriginal matters).

Description	Marks
<ul style="list-style-type: none"> <li>Identifies Sn 51 is concerned with the division of powers between the Commonwealth and the States.</li> <li>Indicates that electors have been most reluctant to ratify transference of powers to federal government.</li> <li>Identifies that when power has been transferred to the Commonwealth it is when the electorate can envisage some benefit. Examples could include things such as social services or Commonwealth resources to address Aboriginal disadvantage, or approving what is already in place (Loan Council 1928).</li> <li>Identifies that when power is not transferred it is for reasons including multiple votes on the same day, effective media campaigns, a desire for the states to remain strong in a Federal system. Examples could include 1974, 1988,1999.</li> </ul>	5-6
<ul style="list-style-type: none"> <li>Identifies Sn 51 is concerned with the division of powers between the Commonwealth and the States.</li> <li>Indicates that electors have been most reluctant to ratify transference of powers to federal government.</li> <li>General recognition that when power has been transferred to the Commonwealth it is when the electorate can envisage some benefit.</li> <li>General recognition of catch phrases to suggest why power may not be transferred such as 'if it aint broke don't fix it' or 'if in doubt vote no'.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Some general reference to the fact it concerns division of powers</li> <li>Some reference to 'no' votes or catch phrases.</li> </ul>	1-2

- (d) Identify a major reform to amend the Commonwealth Constitution (Australia).  
Evaluate the arguments for and against the reform proposal.

Description	Marks
<ul style="list-style-type: none"> <li>Identifies and explains a major reform to amend the Commonwealth Constitution which could include the recognition of local government as the third tier of government; republic; preamble; rights and freedoms; and distribution of powers e.g. health, education and environment.</li> <li>Provides two arguments with detailed explanation to support the reform such as with recognition of local government that this would ensure that local government would be consulted at the national level in national forums; consulted in removing overlap or duplication; not dismissed arbitrarily; may enhance voter interest; closer to the people and democratically elected.</li> <li>Provides two arguments with detailed explanation against the reform such as more appropriate to recognise local government in State Constitutions; would not stop the states from altering boundaries or amalgamating local government bodies.</li> <li>Draws a conclusion by assessing and weighing up the supporting evidence.</li> </ul>	7-8
<ul style="list-style-type: none"> <li>Identifies and simply explains a major reform to amend the Commonwealth Constitution.</li> <li>Provides an argument to support the reform.</li> <li>Provides an argument against the reform.</li> <li>Offers a concluding statement but minimal assessment, and supporting evidence.</li> </ul>	5-6
<ul style="list-style-type: none"> <li>Identifies a major reform to amend the Commonwealth Constitution.</li> <li>Provides a general statement to support the reform.</li> <li>Provides a general statement against the reform.</li> <li>Offers a concluding statement with little to no assessment or evidence.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Identifies a reform, not necessarily major, to amend the Commonwealth Constitution.</li> <li>Provides a general statement either in support of or against the reform and there is no assessment.</li> </ul>	1-2



Source Two: Unit 3B.

International Covenant on Civil and Political Rights (Article 14.)

## Question 6

(a) What is an international covenant? (2 marks)

Description	Marks
<ul style="list-style-type: none"><li>Clearly recognises that a covenant is a formal legal international agreement between several parties or nations.</li></ul>	2
<ul style="list-style-type: none"><li>Indicates that it is an international agreement.</li></ul>	1

(b) Identify two features of Article 14 which are regarded as difficult to uphold and explain why this would be the case. (4 marks)

Description	Marks
<ul style="list-style-type: none"><li>Identifies two features of the covenant that are difficult to uphold and explains why they are difficult to uphold.</li><li>This could include:<ul style="list-style-type: none"><li>3(a) not always possible to obtain interpreter services promptly</li><li>3(b) not everyone can have the legal counsel of 'his own choosing'</li><li>3(c) undue delay in courts is often unavoidable</li><li>3(d) Legal Aid funds are finite. Dietrich determines when counsel must be given to defendant</li><li>3(e) not always possible to force witnesses to attend (they may have left the jurisdiction etc).</li></ul></li></ul>	4
<ul style="list-style-type: none"><li>Identifies two features of the covenant that difficult to uphold and explains in general terms why they are difficult to uphold.</li></ul>	3
<ul style="list-style-type: none"><li>Identifies two features that are difficult to uphold but gives no explanation as to why they are difficult to uphold.</li></ul>	2
<ul style="list-style-type: none"><li>Identifies one feature that is difficult to uphold but gives no explanation as to why it is difficult to uphold.</li></ul>	1

(c) Discuss the extent to which the provision regarding legal representation in Article 14 is upheld in the Australian legal system. (6 marks)

Description	Marks
<ul style="list-style-type: none"><li>Identifies what Article 14 provides in relation to legal representation.</li><li>Discusses the extent of the availability of legal representation in Australia.</li><li>Integrates reference to specific services such as Legal Aid, community legal centres, pro bono services.</li><li>Identifies the legal requirements as established in the <i>Dietrich</i> case – right to legal representation as part of a fair trial.</li></ul>	5-6
<ul style="list-style-type: none"><li>Identifies what Article 14 provides in relation to legal representation.</li><li>Discusses some aspects of the availability of legal representation in Australia.</li><li>Makes some reference to specific services.</li><li>General recognition of the <i>Dietrich</i> case.</li></ul>	3-4
<ul style="list-style-type: none"><li>Some general reference to what Article 14 provides in relation to legal representation.</li><li>Some general reference to legal representation in Australia and/or the Dietrich case.</li></ul>	1-2

- (d) With reference to at least one human right issue in Australia, assess the influence of protocols and treaties on the political and legal system.

Description	Marks
<ul style="list-style-type: none"> <li>Identifies one human rights issue and explains.</li> <li>Explains the difference between protocols and treaties and how they are ratified.</li> <li>Recognises and explains how protocols and treaties are incorporated into Australian law in this area.</li> <li>Assesses the influence of specific protocols and treaties on the Australian political and legal system in relation to this right e.g. mandatory sentencing.</li> </ul>	7-8
<ul style="list-style-type: none"> <li>Identifies one human rights issue and explains.</li> <li>Explains the difference between protocols and treaties.</li> <li>Recognises and may explain how protocols and treaties are incorporated into Australian law in this area.</li> <li>Discusses the influence of specific protocols and treaties on the Australian political and legal system in relation to this right.</li> </ul>	5-6
<ul style="list-style-type: none"> <li>Identifies and explains one human rights issue.</li> <li>Identifies a difference between protocols and treaties.</li> <li>Offers some explanation as to how protocols and treaties are incorporated into Australian law in this area.</li> <li>Makes a general statement about the influence of specific protocols and treaties on the Australian political and legal system in relation to this right.</li> </ul>	3-4
<ul style="list-style-type: none"> <li>Identifies a human right issue.</li> <li>Makes statements about protocols and treaties.</li> <li>May identify an example of where a protocol or treaty has influenced Australian law.</li> </ul>	1-2

Question 7

'In theory governments are elected with a mandate but this is far removed from reality in Australia today.'

Assess the validity of this claim.

Description	Marks
<ul style="list-style-type: none"> <li>Explains what is meant by a mandate.</li> <li>Presents a critical analysis of the theory of mandates within Australia.</li> <li>Integrates relevant examples of the types of mandates claimed within Australia before discussing the realities of policy, legislation and the dynamics of parliament.</li> <li>Presents a reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	21-25
<ul style="list-style-type: none"> <li>Explains what is meant by a mandate.</li> <li>Presents an analysis of the theory of mandates within Australia.</li> <li>Integrates mostly relevant examples of the types of mandates claimed within Australia before providing some discussion on the realities of policy, legislation and the dynamics of parliament.</li> <li>Presents a mostly reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	16-20
<ul style="list-style-type: none"> <li>Shows some understanding of what is meant by a mandate.</li> <li>Presents a general description of the theory of mandates within Australia.</li> <li>Provides some relevant examples of the types of mandates claimed within Australia before making a general statement as to the realities of policy, legislation and the dynamics of parliament.</li> <li>Presents a discussion with some reason, balance and coherence using some relevant political and legal terminology.</li> </ul>	11-15
<ul style="list-style-type: none"> <li>Presents a statement regarding what is meant by a mandate.</li> <li>Presents limited descriptions of the theory of mandates in Australia.</li> <li>Provides limited relevant examples of the types of mandates claimed within Australia before making a statement as to the realities of policy, legislation and the dynamics of parliament.</li> <li>Presents statements rather than a reasoned, balanced and coherent discussion using limited relevant political and legal terminology.</li> </ul>	6-10
<ul style="list-style-type: none"> <li>Shows minimal to no understanding of the meaning of a mandate.</li> <li>Presents minimal or no description of the theory of mandates in Australia.</li> <li>Provides minimal or no relevant examples of the types of mandates claimed within Australia or offers minimal to no comment on the realities of policy, legislation and the dynamics of parliament.</li> <li>Presents minimal statements and no discussion with minimal or no relevant political and legal terminology.</li> </ul>	0-5

Examples that could be used to assess whether in theory governments are elected with a mandate but this is far removed from reality in Australia today include:

A political mandate is the claiming of authority by a government or elected officials to implement election promises or an electoral program.

- The grounds upon which political mandates are claimed are varied often being linked to theories of the sovereignty of the people, the General Will and the assertion that a government and its policies must enjoy the consent of those whom they govern. In more practical terms a government most often claims a mandate to implement its policies on the basis that at the most recent election that it is the party or coalition or alliance able to obtain the confidence or support of a majority of members in the lower house. At the same time this 'majoritarian mandate' is still thought to imply that the Opposition have a legitimate role to criticise, but not block, amend or unduly delay government legislation.
- Sometimes, though, a mandate is claimed on the basis that a political party has won the majority of the votes cast or has gained a two-party preferred majority in the lower house at the last election. Occasionally, too, political parties (often 'third' or minor parties) claim a Senate mandate to argue for key elements of its policy platform partly on the basis of the seats won in the Senate having been gained on the basis of the proportional representation (or more reflective of the 'will of the people') voting system. In 1996 Australian Democrats leader Cheryl Kernot claimed that supporters of her party were deliberately using their vote to ensure that the government was subject to the checks and balances of the Senate.
- Even more recently in 2007 to 2010 Senator Nick Xenophon and Senator Steve Fielding have been linked with a 'balance of power' mandate whereby they have exercised crucial judgment on legislation including voting against the Rudd governments Emissions Trading legislation. Both claim they have a mandate or right to exercise such judgement.
- Advocates of the notion of a political mandate say it takes into account the practical importance of party policies and party labels as it imposes a broad meaning on election results as well as providing a way of keeping governments to their word or promises both for and against programs. Voters it is asserted have not only chosen between sets of candidates, but also between party policy packages. As a consequence of the 1998 Federal election victory the Coalition Government led by John Howard could claim a mandate to introduce a Goods and Services Tax (GST). On this basis the government with its majority in the House of Representatives should be able to introduce its GST without impediment in the Senate. This legitimacy could not be claimed with the introduction of WorkChoices legislation in 2006.
- Critics of the mandate theory say that while voters may be influenced by policies, it is more likely that they will be attracted by certain manifesto commitments, but less committed to a range of other policies. It is known, too, that voters can be influenced by a range of 'irrational' factors, such as the attributes and personalities of leaders, the images of political party and habitual allegiances. Again John Howard chose to send Australian troops to Iraq, on the basis of being the elected Prime Minister, but his government lacked a mandate for this policy. The mandate theory imposes a 'strait jacket' on a political party making it difficult to adjust to new policies. Prime Minister Kevin Rudd's government chose to adopt an economic stimulus package although his party had fought the 2007 election on 'conservative economics' and commitment to balanced budgets for the next term.

In summary political mandates are claimed on several grounds but are really only theoretical claims or constructs to help legitimise a policy or legislative approach.

Question 8

'Legalism and activism are regarded as important doctrines of judicial interpretation.'  
Evaluate this claim with reference to at least one Australian common law decision and at least one constitutional decision.

Description	Marks
<ul style="list-style-type: none"> <li>Explains what is meant by legalism and activism in relation to judicial interpretation.</li> <li>Presents a critical analysis of each of legalism and activism as doctrines of judicial interpretation.</li> <li>Integrates relevant examples of legalism and activism in judicial interpretation in at least one constitutional and at least one common law case before discussing whether legalism and activism are important doctrines of judicial interpretation.</li> <li>Presents a reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	21 - 25
<ul style="list-style-type: none"> <li>Explains what is meant by legalism and activism in relation to judicial interpretation.</li> <li>Presents an analysis of each of legalism and activism as doctrines of judicial interpretation.</li> <li>Integrates mostly relevant examples of legalism and activism in judicial interpretation in at least one constitutional and at least one common law case before indicating whether legalism and activism are important doctrines of judicial interpretation.</li> <li>Presents a mostly reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	16-20
<ul style="list-style-type: none"> <li>Provides some explanation of the meaning of legalism and activism in relation to judicial interpretation</li> <li>Presents a general description of each of legalism and activism as doctrines of judicial interpretation.</li> <li>Provides some relevant examples of legalism and activism in judicial interpretation in at least one constitutional and at least one common law case before making a general statement as to whether legalism and activism are important doctrines of judicial interpretation.</li> <li>Presents a discussion with some reason, balance and coherence using some relevant political and legal terminology.</li> </ul>	11-15
<ul style="list-style-type: none"> <li>Presents a statement regarding what is meant by legalism and activism in relation to judicial interpretation</li> <li>Presents limited descriptions about each of legalism and activism as doctrines of judicial interpretation.</li> <li>Provides limited relevant examples of legalism and activism in judicial interpretation in at least one constitutional and at least one common law case before making a statement as to whether legalism and activism are important doctrines of judicial interpretation.</li> <li>Presents statements rather than a reasoned, balanced and coherent discussion using limited relevant political and legal terminology.</li> </ul>	6-10
<ul style="list-style-type: none"> <li>Shows minimal to no understanding of legalism and activism in relation to judicial interpretation</li> <li>Presents minimal or no description about each of legalism and activism as doctrines of judicial interpretation.</li> <li>Provides minimal or no relevant examples of legalism and activism in judicial interpretation in at least one constitutional and at least one common law case.</li> <li>Presents minimal statements and no discussion with minimal or no relevant political and legal terminology.</li> </ul>	0-5

Cases and arguments that could be used to evaluate whether legalism and activism are important doctrines of judicial interpretation could include:

Definition of legalism:

- "An approach to the analysis of legal questions characterized by abstract logical reasoning focusing on the applicable legal text, such as a constitution, legislation or case law, rather than on the social, economic, or political context" (Butterworths) – *Engineers' case*

Definition of activism:

- An approach to judicial decision making that goes beyond the mere interpretation of the legal text and considers the common law sources, principles and public policy.

Constitutional cases to consider may include:

- *Engineers' Case* (1920) 28 CLR 129
- *Australian Communist Party Case* (1951) 83 CLR 1
- *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

Non Constitutional cases may include:

- *Mabo v Queensland (No 2)* (1992) 175 CLR 1
- *Dietrich v Queen* (1992) 177 CLR 292
- *Wyong Shire Council v Shirt* (1980) 146 CLR 40

Legalism

- The courts are not a legislature nor law reform agencies;
- Formal application of rules and formulae;
- Common law constitutional method - emphasises the interpretation for text and structure of the Constitution;
- Considered by many as no longer an efficient tool;
- Textual approach – gives phrases their ordinary and natural meaning;
- Structural approach – judges can draw inferences from provisions but within context;
- Finding the purpose of constitutional provisions based on the intentions of the Constitution's framers/founders;
- Interpret and apply values inherent in law.

Activism

- Judicial policy requires a balance between need for continuity, consistency and predictability against justice, flexibility and rationality;
- Adoption of a semi quasi law making role by the judiciary;
- Common law constitutional method - where interpretation for text and structure of the Constitution is not enough judges will look to the social interests, values and policies of contemporary Australia;
- Society and therefore laws are inherently capable of evolving within context;
- Influenced by changes in Australian society;
- Accord less weight to precedent and considers policy and value considerations.

Question 9

Evaluate the citizenship experience for either an individual or group in terms of access and equity within the political and legal system of Australia and at least one other country.

Description	Marks
<ul style="list-style-type: none"> <li>Explains what is meant by citizenship experience, access and equity.</li> <li>Presents a critical analysis of the citizenship experience in terms of access and equity within Australia and at least one other country of an individual or a group.</li> <li>Integrates relevant examples of the issues of access and equity within the political and legal system of Australia and at least one other country of an individual or a group.</li> <li>Presents a reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	21-25
<ul style="list-style-type: none"> <li>Explains what is meant by citizenship experience, access and equity.</li> <li>Presents an analysis of the citizenship experience in terms of access and equity within Australia and at least one other country of an individual or a group.</li> <li>Integrates mostly relevant examples of the issues of access and equity within the political and legal system of Australia and at least one other country of an individual or a group.</li> <li>Presents a mostly reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	16-20
<ul style="list-style-type: none"> <li>Shows some understanding of the meaning of citizenship experience, access and equity.</li> <li>Presents a general description of the citizenship experience in terms of access and equity within Australia and at least one other country of an individual or a group.</li> <li>Provides some relevant examples of the issues of access and equity within the political and legal system of Australia and at least one other country of an individual or a group.</li> <li>Presents a discussion with some reason, balance and coherence using some relevant political and legal terminology.</li> </ul>	11-15
<ul style="list-style-type: none"> <li>Presents a statement regarding what is meant by citizenship experience, access and equity.</li> <li>Presents limited descriptions about the citizenship experience in terms of access and equity within Australia and at least one other country of an individual or a group.</li> <li>Provides limited relevant examples of the issues of access and equity within the political and legal system of Australia or another country of an individual or a group.</li> <li>Presents statements rather than a reasoned, balanced and coherent discussion using limited relevant political and legal terminology.</li> </ul>	6-10
<ul style="list-style-type: none"> <li>Shows minimal to no understanding of the meaning of citizenship experience, access and equity.</li> <li>Presents minimal or no description of the citizenship experience in terms of access and equity within Australia and at least one other country of an individual or a group.</li> <li>Provides minimal or no relevant examples of the issues of access and equity within the political and legal system of Australia or another country of an individual or a group.</li> <li>Presents minimal statements and no discussion with minimal or no relevant political and legal terminology.</li> </ul>	0-5

The citizenship experience of a particular individual or group in terms of access and equity within the political and legal system could be examined in Australia and another country to include:

Citizenship is linked to the well-being of peoples or citizens in a country or nation in terms of access (ability to exercise rights) and equity (degree to which citizens are treated with equal fairness) often through an assessment as to whether such peoples satisfy various benchmarks. For instances these benchmarks may be legal, social, economic, educational, cultural, health or environmental.

In 1995 the Senate Legal and Constitutional Affairs Committee defined citizenship in terms of 'full membership and active (participation), in a just democratic and mutually supportive political community, including individual collective rights and responsibilities-legal, social, economic, cultural and environmental-that go with such membership; and the public and private policies and resources needed to sustain participation'.

- The citizenship experience, with emphasis on access and equity, can be documented in terms of an individual or group in Australia and in another country. For instance in Australia (Western Australia) the citizenship experience of Ernie Bridge or may be examined in the context of Indigenous peoples in the nation. In another country, Martin Luther King could be examined in the context of African-American peoples in the United States of America.
- A very useful comparison for a group would be Aboriginal peoples in Australia and Canada.

Historical Background for Indigenous Australians (Legal/Constitutional):

- 1831: Battle of Pinjarra
- 1886: *Aborigines Protection Act*. Aborigines Protection Board established to provide Aboriginal people with food and clothing when destitute.
- 1889: *Constitution Act* (Western Australia). Aborigines Protection Board retained with a guarantee of revenue to promote well-being of Aborigines.
- 1893: Aborigines specifically denied the franchise in Western Australia, except in the case of a freehold property qualification.
- 1897: *Constitution Act 1889* amended to abolish Aborigines Protection Board.
- 1901-Australian Constitution. Sec. 127. Aboriginal peoples not counted. Sec. 51 (xxvi) Commonwealth Government denied power to make special laws for Aboriginal race.
- 1905: *Aborigines Act*. Protective legislation made the Chief Protector the legal guardian of all Aboriginal children.
- 1944: *The Natives (Citizenship Rights) Act* (WA) gave limited rights to Aboriginal people who could prove, among other things that they had adopted a 'civilised life' and did not associate with Aborigines.
- 1948: *Nationality and Citizenship Act* establishes that all Australian born people are citizens of Australia rather than British subjects.
- 1949: The right to vote in federal elections extended to Indigenous people who served in the armed forces, or who are enrolled to vote in state elections to vote.
- 1962 Franchise granted to Aboriginal peoples, if enrolled. State/Federal
- 1963: *Native Welfare Act* lifted the restrictions on Aboriginal people, unless they were nomadic.
- 1967 Referendum: Commonwealth Government restriction on power to make special laws for 'aboriginal race' removed from Sec. 51 of the Constitution.
- 1975 *Racial Discrimination Act*
- 1982 High Court *Koowarta* Decision
- 1983 Compulsory enrolment and voting for Aboriginal peoples.
- 1992 High Court *Mabo* Decision (Land rights to Aboriginal peoples in some circumstances).



- 1993: *Native Title Act (Commonwealth)*
- 2006: Northern Territory Intervention
- 2008: (13 February) National Apology by Prime Minister Kevin Rudd.

Historical background for Ernie Bridge:

- In 1980 Ernie Francis Bridge, as a well-known Kimberley identity in local government, land rights, sport and music, won the Legislative Assembly seat for that district at his second attempt.
- Historically, he was the first Indigenous person to gain a seat in the Western Australian Parliament. Six years later he became Australia's first Aboriginal Cabinet Minister. The Water Resources portfolio gave him a forum to advocate his Lake Argyle to Perth water pipeline.
- Interestingly, he regarded his eighteen years in local government (1962-1980), including fourteen years as Halls Creek Shire President (1965-1979) as 'invaluable' preparation for Cabinet. Nevertheless he once said 'ringing on a phone from Hall's Creek is not the same. Phone conversations do not clinch deals. Person contact has an enormous amount of impact'.
- Upon his departure from Parliament in 2001, Ernie Bridge continued to play a prominent role in public life particularly on health questions and as President of the Watering Australian Foundation. Earlier in 1997 he established Unity of First People of Australia, a non-profit organization which assists Aboriginal people in Western Australia with employment within the law and order, health and education industries.
- Important elements of Ernie Bridge's citizenship experience was his quest for land rights and determination in his opinion not to fall victim of an attitude that prevented full participation in the political process. Perhaps his profile as a musician and sportsman helped his self identity to ensure his capacity to exercise full citizenship rights. He did not have an extensive formal education and was able to avoid the poverty and health traps which have afflicted Indigenous peoples.

Question 10

'The political and legal system of Australia ideally assures that democratic principles of governance will be upheld'.

Assess the validity of this statement with reference to representation and the rule of law.

Description	Marks
<ul style="list-style-type: none"> <li>Explains what is meant by democratic principles of governance.</li> <li>Presents a critical analysis of each of representation and the rule of law within Australia.</li> <li>Integrates relevant examples of the existence of the criteria in the question before discussing the extent to which Australia meets the ideal.</li> <li>Presents a reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	21-25
<ul style="list-style-type: none"> <li>Explains what is meant by democratic principles of governance.</li> <li>Presents an analysis of each of representation and the rule of law within Australia.</li> <li>Integrates mostly relevant examples of the existence of the criteria in the question before indicating if Australia does/does not meet the ideal.</li> <li>Presents a mostly reasoned, balanced and coherent discussion using relevant political and legal terminology.</li> </ul>	16-20
<ul style="list-style-type: none"> <li>Shows some understanding of the democratic principles of governance.</li> <li>Presents a general description of each of representation and the rule of law within Australia.</li> <li>Provides some relevant examples of the existence of the criteria in the question before making a general statement as to whether Australia meets the ideal.</li> <li>Presents a discussion with some reason, balance and coherence using some relevant political and legal terminology.</li> </ul>	11-15
<ul style="list-style-type: none"> <li>Presents a statement regarding what is meant by democratic principles of governance.</li> <li>Presents limited descriptions about each of representation and the rule of law within Australia.</li> <li>Provides limited relevant examples of the existence of the criteria in the question before making a statement as to whether Australia does/does not meet the ideal.</li> <li>Presents statements rather than a reasoned, balanced and coherent discussion using limited relevant political and legal terminology.</li> </ul>	6-10
<ul style="list-style-type: none"> <li>Shows minimal to no understanding of the democratic principles of governance.</li> <li>Presents minimal or no description of each of representation and the rule of law within Australia.</li> <li>Provides minimal or no relevant examples of the existence of the criteria in the question.</li> <li>Presents minimal statements and no discussion with minimal or no relevant political and legal terminology.</li> </ul>	0-5

Using representation and the rule of law, examples that could be used to assess whether the political and legal system of Australia ideally assures the democratic principles of governance will be upheld could include:

Definition of governance:

- Governance means the process of decision-making and the process by which decisions are implemented (or not implemented). It relates to decisions that define expectations of verifying performance.

Democratic principles of governance could include constitutionalism, representative and responsible government, the role of the opposition, the democratic ideals of justice, liberty, equality and community, pluralistic society – the above being discussed in terms of the political and legal system.

An analysis of each of representation and the rule of law within Australia could include:

- Representation could include a discussion of the extent of the franchise, the electoral system and the AEC's role, elected officials and the extent they mirror society or are they mere delegates of political parties, avenues available within parliament compared to the reality
- Rule of law could include a discussion of the aspects which include known predictable and impartial rules of conduct, no punishment without law, judicial discretion, government subject to the law and recognised procedures.

Examples that could be used to assess whether the Australian political and legal system upholds the democratic principles of governance in relation to representation could include:

- Franchise – how the franchise has been extended to include women, Aboriginals, 18 year olds
- Electoral system – the role and function of the AEC in the electoral process, voting systems and the extent that these reflect 'the will of the people', parliament and representation – mirror compared to party representation, representation within parliament and avenues available in parliament – petitions, question time, committee submissions and the reality of this, the significance of party representation rather than representation of the people or the states

Australia and Representation

- Australia has an elected bicameral parliament with universal franchise coupled with compulsory registration and compulsory voting. Voting rights are denied to non-citizens and certain categories of prisoners (those full time prisoners for terms longer than three years). The preferential voting system in the House of Representatives, for three year terms, broadly ensures elections of government having majority support. Both the major political parties Labor and Liberal (in coalition with the National Party) have both held power at the Federal level in the last decades. Proportional representation in the Senate helps ensure a representation of political parties in proportion to the popular vote. However, less populous States, (particularly Tasmania), have representation above its population weighting. Such weighting is the consequence of Australia being a federation.
- In Australia the representation of women in 2009, was 26.7% in the House of Representatives and 35.5% in the Senate. The nationwide figure is 30.7%. The 2007 Rudd Cabinet consisted of 7 women out of a total 31.
- Indigenous peoples constitute 2.5 per cent of the Australian population with representation in Parliament being very low across all states and currently (2010) nil in Federal Parliament. There have only been two Indigenous Australians elected to Federal Parliament (Neville Bonner and Aden Ridgeway) Cook et al (2009:267 – 283) offers an extensive analysis of reasons why Indigenous Australians are very poorly represented in Australian politics.

- Sawyer, Abjorensen and Larkin (2009) offer a detailed analysis on the topic of representation, including the fact that Australian voter turnout is the highest in the world, contrasted with issues such as the difficulties faced by minor parties and independents. Clearly there is a bias towards the two major parties but one can argue that is representative, at least of majority interests. Minor parties and independents also have the opportunity, courtesy of the Proportional Voting system in the Senate, to exploit 'Balance of Power' scenarios. Preferential voting also allows them to influence election results through the allocation of their preferences.

Examples that could be used to assess whether the Australian political and legal system upholds the democratic principles of governance in relation to the rule of law could include:

- Known, predictable, impartial rules of conduct – existence of common law and statute law, the laws applying to all but some in the community may feel that they are negatively discriminated against. For example, Aboriginals – the place of customary law within the legal system, imprisonment rates; anti-terrorism laws and certain ethnic or national groups within Australia; family law and custody issues (men)
- No punishment without law – no arbitrary detention/imprisonment (terrorism laws); innocent until proven guilty; sentencing – parameters within which the judiciary must operate (judicial discretion) e.g. NT and WA issues regarding mandatory sentencing
- Government subject to the law – actions are subject to scrutiny within and outside the parliament; legislation can be challenged in the HC (constitutionalism and governance) e.g. Workchoices 2006 - States and the ACTU; validity of the military tribunals as a judicial body; Cole Commission - ministers and the departments subject to scrutiny (Howard, Downer and Vaile AWB)
- Pressure groups and the media in relation to scrutiny of government
- Recognised procedures – individuals/entity knows the process in terms of arrest/prosecution/punishment/appeal e.g. miscarriage of justice (Mallard); questioning of suspects by police (Dante Arthurs)

#### Australia and the Rule of law

- According to Sawyer, Abjorensen and Larkin (2009), in their assessment of the state of democracy in Australia, 'in general terms it can be said that the rule of law is respected in Australia and operates across the country'. The same authors claimed 'one group for whom the rule of law has often failed is those fleeing persecution and seeking asylum in Australia'. Australia it is observed has frequently been found in breach of its obligations under the International Covenant on Civil and political Rights because of the arbitrary detention of asylum seekers.
- Other Australian shortcomings with respect to the rule of law are documented as customary law with regards to Indigenous people, cost and delay in the judiciary system, and significant barriers to certain groups such as homeless peoples, ethnic groups, lower socio-economic status groups and Indigenous groups.
- The extent to which public officials are subject to the concept. This is clearly not always the case. In 2004, the Federal Government refused to allow Ministerial staff to be questioned in regards to the 'Children Overboard' affair. Subsequent investigations found that these allegations against asylum seekers were untrue. The Federal Government also denied an investigation into the role of the executive within the AWB affair, where it was alleged that wheat export bribes had been paid to Iraq.
- Parliamentary privilege also allows MP's protection against defamatory comments made in Parliament. An example of this is when in 2002 Senator Heffernan accused High Court Justice Michael Kirby of using a government vehicle for solicitation purposes. Testimony from the driver of the vehicle later proved this to be false. Heffernan was forced to apologise but was protected from prosecution under parliamentary privilege.

## ACKNOWLEDGEMENTS

### Section Two

- Source 2** Office of the United Nations High Commissioner for Human Rights. (1976). *International Covenant on Civil Rights and Political Rights* (Article 14). Retrieved January, 2010, from [www2.ohchr.org/english/law/ccpr.htm#art14](http://www2.ohchr.org/english/law/ccpr.htm#art14)